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Supreme Court of the United States

OCTOBER TERM 1943

No. 439

HARRISON E. FRYBERGER,
Plaintiff-Appellant,

against

CONSOLIDATED ELECTRIC & GAS COMPANY, a corporation organized and existing under the laws of Delaware, and CENTRAL PUBLIC UTILITY CORPORATION, a corporation organized and existing under the laws of Delaware,
Defendants-Respondents.

PETITIONER'S REPLY BRIEF

HARRISON E. FRYBERGER,
Counsel for Petitioner.

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CASES CITED

STATUTES AND OTHER AUTHORITIES

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PETITIONER'S REPLY BRIEF

Petitioner for his reply to the brief of respondents herein, respectfully shows to the Court:

1) Said answering brief is frivolous, irrelevant and immaterial; it is composed of baseless conclusions and the same can only be regarded as scandalous. The record shows that respondents are guilty of the commission of frauds on Justice Lydon, on the Appellate Division, First Department, on the Chancery Court of Delaware, on Justice McGeehan, and the record shows conclusively that there is not a particle of evidence in the record even tending to sustain the defense of res judicata.

2) No denial is made on the record as to the number of shares of Class A stock purchased by plaintiff and his assignors, the dates and prices paid and that plaintiff and

his assignors in January, 1930, held a valid claim against these respondents for the sum of $17,176, net investment. The record shows, and no denial is made, that a notice of rescission was served on the Central Public Service Corporation in April, 1932. Also that on or about May 6, 1932, plaintiff and his assignors surrendered certificates for 438 shares of Class A stock to the Central Public Service Corporation and demanded back their money. Also that on May 18, 1932, the C. P. S. Corp. assigned all these certificates to a subsidiary called the Central Securities Transfer Company, or that on August 1, 1932, all of these identical certificates surrendered by plaintiff and his assignors were sold, assigned and transferred by the C. P. S. Corp. and its said subsidiary, Central Securities Transfer Company, to the Central Public Utility Corporation, one of the respondents, and this charge is also admitted by Part III of the Plan of Reorganization and there is no denial that there was a rescission by operation of law and a cancellation of the original sale of these certificates of stock. These facts so admitted are decisive of every phase of this controversy.

3) The record shows that these respondents (defendants in the Court below) were asserting throughout the trial of the so-called Harris Case before Mr. Justice Lydon, that the action was one by plaintiff as a stockholder for rescission of contracts, that is, as between himself and these two respondents. See R. Harris Case, fols. 5-2135, 2656-2699, 3110-3113. Justice Lydon so held, R. Harris Case, fol. 5. Also the Appellate Division, First Department, R. Harris Case, fol. 3900. Moreover, when we got to the Court of Appeals, these two respondents filed a formal brief in which they stated (as is set forth at pp. 17, 18 of petition) that this cause of action was tried before Justice Lydon on the theory that it was an action for rescission and not a creditor's bill and that this being the case, the entire proceedings were null and void because an indispensable party defendant, namely, the C. P. S. Corp., was omitted. The same

position was taken by these respondents in their brief entitled "Brief in opposition to motion for reargument". Respondents admit in their brief that all these charges are true. On the other hand, as shown by R. Harris Case, fols. 2392-2398, petitioner (plaintiff in the Court below) asserted as follows:

4) That plaintiff's cause of action as set forth in the Harris Case as between him and these two respondents, was one by plaintiff as a creditor to recover the purchase price and to establish an equitable lien on the assets transferred by the Central Public Service Corporation on August 1, 1932, in violation of his rights, it is only necessary to read the testimony of petitioner (plaintiff in the Harris Case) found R. Harris Case, fols. 2391-2398 on his cross-examination by counsel for defendants. At folio 2392, question and answer are as follows:

> "Q. You allege in your complaint, Mr. Fryberger, 'And that by reason of the facts herein set forth plaintiff in the months of April and May 1932 was converted from a stockholder to a creditor of Central Public Service Corporation'. A. Yes, that is true."

Also at R. Harris Case, folio 2398, question and answer are as follows:

> "Q. What is your position now, that you are suing here for a decree to rescind the contract of purchase—that is your position now, isn't it? A. My position is this: That having rescinded the purchase of this stock on the ground of fraud, that I am entitled to assert a lien against these assets in the hands of these two new companies for the amount that we paid for that Class A stock with interest, and at the same time that in the compass of the same suit I am entitled to recover whatever damages that I am entitled to from the other defendants."

Under all the authorities, at the present time, a creditor as defined by Section 1 of the New York Fraudulent Con-

veyance Act, is a person having any claim whether mature or immature, liquidated or unliquidated, absolute, fixed or contingent and under all the authorities, it is held that the service of a notice of intention to rescind a transaction is sufficient to make a person a creditor.

> See *Black on Rescission* (2d Ed.), Sec. 623.
> *First National* v. *Frankel,* 235 App. Div. 96 (N. Y.).
> 14 *C. J.,* pp. 601 and 602.
> *Benjamin on Sales* (7th Ed.), p. 417.
> *Fletcher on Corporations,* Vol. 12, Secs. 5596-7-5604.

5) The record is without dispute that the defense of estoppel by judgment could not be asserted in this case for the reason that the parties, the cause of action and the object of the Harris Case were entirely different from the parties, the cause of action and the object of the present suit. Also it is asserted in the petition and admitted by respondents that there were two distinct causes of action involved, one as claimed by respondents that the cause of action was one by plaintiff for rescission of contracts and the other, a cause of action by plaintiff as a creditor to recover the purchase price of certain stock and to establish an equitable lien. Therefore, under all the authorities a trial of one theory would leave the other open to prosecution at any time. Finally, the record shows, and there is no denial, that the judgment in the Harris Case could not possibly be on the merits.

6) The decision of the New York Court of Appeals in *Fryberger* v. *Harris,* 273 N. Y. 115, at p. 117, confirms in every particular the position taken by petitioner in his petition. At page 117, second paragraph, the Court of Appeals says:

> "The action has been treated and tried as an action in equity. Appellant denominates it as an action in the nature of a creditor's bill. The Appellate Division referred to it as an action for rescission."

The opinion then sets forth the allegations in the bill of complaint from which it appears beyond a doubt that the cause of action was one by plaintiff as a creditor to recover the purchase price of stock and to impress a lien upon assets of the corporation alleged to have been transferred in fraud of creditors. As shown by paragraph 2 of the headnotes, the Court of Appeals held as follows:

> "In an action to recover the purchase price of stock and to impress a lien upon assets of the corporation alleged to have been transferred in fraud of creditors, where after trial the complaint has been dismissed and, on appeal, the Appellate Division has unanimously affirmed the judgment entered upon the decision of the trial court, a further appeal may not be taken, without permission, to the Court of Appeals. No constitutional question is presented by plaintiff's contention that the judgments of the courts below are erroneous."

The quotation from the opinion of the Court of Appeals found at bottom of page 2 of the answering brief, signifies nothing, except that Justice Lydon devoted nine days to the trial of this cause of action on the theory it was one by plaintiff as a stockholder for rescission. It had nothing to do with plaintiff's cause of action as a creditor.

To summarize, Justice Lydon, the Appellate Division, First Department, the New York Court of Appeals held that as between plaintiff in the Harris Case, and these respondents, this cause of action was tried on the theory that it was an action by plaintiff as a stockholder for rescission of contracts; while the Court of Appeals held the cause of action as pleaded was one by plaintiff as a creditor to recover the purchase price of stock and to establish an equitable lien.

7) It is alleged in the petition and there is no dispute in the record that respondents in their demurrers to plaintiff's bill of complaint in the Delaware suit falsely and fraudulently represented, that the complaint in the Harris Case

> "* * * was dismissed upon the merits after a trial, which dismissal was affirmed by the Appellate Division, First Department, of the State of New York, an appellate court of intermediate jurisdiction, and thereafter said dismissal was further affirmed by the Court of Appeals of the State of New York, the court of last resort in the State of New York, * * *."

These false representations were also set forth in R. this case, fols. 1165-1166, also at fols. 1175-1176. These statements and representations were utterly false because it is admitted on the record that the New York Court of Appeals dismissed the appeal for want of jurisdiction.

The record shows, and there is no denial, that on December 15, 1941, Arthur M. Boal made a false and fraudulent affidavit, which affidavit is found R. this suit, fols. 1270-1273.

8) An examination of the 116 so-called findings of Mr. Justice Lydon in the Harris Case, discloses that there is not one of these findings which is against the recovery by the plaintiff of all he sought. There is no denial by respondents.

An examination of the 14 conclusions of law of Justice Lydon establish beyond controversy that they were drawn on the theory that the cause of action was one by plaintiff as a stockholder for rescission of contracts.

9) The record shows without dispute that some 50,000 potential claimants, as investors, invested the sum of $78,998,514.70 in Class A stock of the C. P. S. Corp. Also that under the Plan of Reorganization of August 1, 1932, assets of the C. P. S. Corp. of the value of approximately $116,000,000 were transferred to Consolidated and that this was supposed to represent 70% of the assets and it was represented that the C. P. S. Corp. retained assets of the value of 30% for the protection of creditors, but the record shows that someone on behalf of Consolidated, made false appraisals of the assets retained and that instead of being

worth $49,000,000 as claimed by Consolidated et al., that the same were not in fact worth a penny. And it is, therefore, admitted on the Record that the said 50,000 investors who contributed the sum of nearly $79,000,000 to this enterprise, will not receive a penny either directly or indirectly out of the reorganization.

10) The record shows that petitioner has not at any time been afforded an opportunity to protect his property right of the value of over $100,000. The record shows that plaintiff's cause of action as a creditor was not litigated before Justice Lydon or before the Appellate Division, First Department, or before the Court of Appeals in the Harris Case or before the Delaware Court of Chancery and that this cause of action has not been litigated or fairly submitted either before Justice McGeehan or before the Appellate Division or the Court of Appeals or in the present suit.

At page 2 of their answering brief, the following language is used:

> "One of the important conclusions of law adopted by Justice Lydon is No. 9" (R. 140, fol. 419).
>
> "Plaintiff has not sustained the burden of proving that any of the representations made to him were false."

Words are inadequate to describe the silly nature of this statement.

1. These 14 conclusions of law being drawn on the theory that this particular cause of action was one by plaintiff as a stockholder for "rescission of contracts", and that an indispensable party defendant had been omitted, the Court had no power to make any findings or conclusions of law.

Strulis v. *Barrow,* 17 How. 128.

2. This conclusion of law is referring only to the parties defendants in the Harris Case.

3. These 14 conclusions of law are drawn on the theory plaintiff is still a stockholder.

4. The record is without dispute there was a rescission of the sale of this stock as a question of law, irrespective of whether there was a legal ground therefor.

5. There was no burden on plaintiff to show false representations against any one. If the stock was worthless, or if the corporation was misappropriating assets by the million dollars, or if it was guilty of fraudulent concealment, that would be sufficient.

6. There are other objections.

Also in connection with conclusion of law No. 11 (R. fol. 419):

In *Hurd* v. *Steam Laundry,* 167 N. Y. 89; also *Cole* v. *Millerton,* 133 N. Y. 164-168, hold that where one corporation transfers substantially all its assets to another corporation, without the payment of its debts, in equity the transferee assumes and agrees to pay these debts.

I

We respectfully submit that the granting of a writ in this proceeding by this Court is not a matter within its entire discretion.

That petitioner has never at any time been afforded an opportunity to protect his said property right.

That respondents by means of their own misrepresentation and by means of the practicing by them of extrinsic frauds, prevented petitioner from any and all opportunities to protect such property right. Therefore, the recent decision of this Court in *Brinkerhoff* v. *Hill,* 281 U. S. 673

(See p. 682), is directly in point as shown by paragraph 4 of the headnotes:

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. P. 682."

Also this decision holds in legal effect that petitioner is entitled to a reversal of the judgment of the New York State Courts as a matter of course and not in the Court's *discretion.*

In *Ohio Bell* v. *Public Utility,* 301 U. S. 292, it is held in the opinion of Justice Cardozo; paragraph 2 of the headnotes:

> "A fair hearing is essential to due process; without it there is condemnation without trial."

This case cites *Morgan* v. *U. S.,* 298 U. S. 38-73, also *Brinkerhoff* v. *Hill,* 281 U. S. 673-682.

It is held in the case of *Railroad* v. *Pacific,* 302 U. S. 388-393, that there are five requirements of a hearing: (1) Notice. (2) A hearing. (3) An opportunity to be heard. (4) The trial must be a fair one. (5) Before an impartial tribunal—the tribunal must act on evidence and not arbitrarily.

A finding without evidence is arbitrary and useless and an act of Congress granting authority to any body to make a finding without evidence would be inconsistent with justice and an exercise of arbitrary power condemned by the Constitution.

> *Interstate Commerce* v. *Louisville,* 227 U. S. 88-91; See many cases cited at page 91.

II

We respectfully ask whether this Court does possess *jurisdiction* to deny a writ to petitioner.

There are many limitations upon the judisdiction of this Court. For example, there are the provisions of the United States Constitution; statutes passed by Congress; the Ten Commandments and laws passed in response thereto; there is the law against robbery, both the common law and the laws embraced in statutes; there is the law, both common law and statutory, against grand larceny; against obtaining property under false pretenses; the laws against swindling; there are the laws against the practice of misrepresentation and fraud on various courts. A number of these criminal offenses committed by Consolidated are directly involved in this litigation. We respectfully submit, it would be regarded as scandalous if respondents should even suggest that this Court should ignore the criminal laws of the nation.

It may be suggested, there is no remedy if this Court denies the writ. We think there is in this particular case.

III

The New York State Courts were and are seeking to protect certain powerful business interests of certain residents of New York City at the expense of the residents of the forty-seven states not including New York.

It is apparent from the record in this proceeding that respondents resorted to all these misrepresentations and practiced their said frauds on the New York State courts, not on account of the claim or cause of action of petitioner against them, but on account of the potential claims of the 50,000 claimants against them. The real object and purpose of respondents was to nullify all these judicial pro-

ceedings and to secure delay until such time as the ten year Statute of Limitations might serve as a bar to the said claims of the 50,000 claimants.

As shown by the record in the Harris Case, the chief sponsors of respondents are: A subsidiary of the Chase National Bank; Stone & Webster Inc.; Stone & Webster Service Corporation; Public Utility Holding Corporation of America; George E. Devendorf and their associates, all of the City of New York, in the State of New York. (See R. Harris Case, fols. 3398-9, also Exhibits 141 and 142, also fols. 3751-.6)

On the other hand, as shown by page 38 of the petition, the great majority of the 50,000 claimants resided in and do now reside in various others of the 47 states of the Union. Very few of these claimants reside in the State of New York. Therefore, the executed object, purpose and plan of respondents was to exploit the property rights of these 50,000 claimants. To state the case differently, respondents and their sponsors planned and conspired together, and finally prevailed upon the New York State courts to adopt a certain line of decision, the legal effect of which was to evade the doctrine of diversity of citizenship which as a matter of law must prevail in a case of this character.

IV

The record in the Harris Case discloses that the issues as set forth in petitioner's book "Abolition of Poverty" published in August, 1931, the issues of the 1932 campaign as set forth in the Democratic Platform of 1932 and the basic principles of the Federal Statute of June 6, 1934, creating the Securities and Exchange Commission, of the contents of which this Court will take judicial notice, are not merely interrelated but they are inseparable and in effect all three documents denounce the attempt of respondents (a) to prevent petitioner from having his day in court, (b) the attempt on the part of certain residents of New York City to practice a $78,000,000 swindle on the residents of the other forty-seven states, (c) the attempt by respondents to practice misrepresentation and fraud on various New York State Courts and the Chancery Court of Delaware.

As set forth in 64 C. J. at page 115, it is not essential that documentary evidence shall be marked and formally offered in evidence. Such requisites may be waived. And they are waived where the Court and parties treat an instrument or document as in evidence, e. g., testifying to the contents of the document, etc., citing many authorities.

Although the books "Abolition of Poverty" and "Riches for All" were not marked in evidence in the record in the Court below yet their contents were testified to by witnesses both for petitioner and these respondents. As shown at R. Harris Case, petitioner testified as a witness on behalf of the plaintiff and on cross-examination counsel for respondents elicited the fact that the plaintiff devoted ten years of his practice in Minnesota to the case of *Backus* v. *Finkelstein*, 23 Fed. (2d) 357. This litigation involved about 130 motion picture theaters, about 40 of which were very actively engaged. The litigation was concluded about

April 1, 1929 except that it took about a year to make a distribution of the fund. Examination of the citator shows that this case is today a leading case, covering certain phases of minority stockholders' litigation. At R. fol. 2924 respondents elicited the fact that the earnings of petitioner for the year 1929 were $200,000. Also as shown by R. 2264, that the plaintiff had devoted three years, namely from the summer of 1930 to July 1, 1933 to public service and that this public service consisted of the writing of two books and as shown by R. fols. 2980-2981, the fact was brought out by respondents that plaintiff gave the book "Abolition of Poverty" to the defendant, Knutson, and that Knutson bought and paid for the book "Riches for All". Further, respondents offered proof that these books were published by the Advance Publishing Company, R. fol. 2265, also R. fol. 3600. As shown by R. Harris Case, fol. 3602, the witness, Knutson, testified that plaintiff was working untiringly and at a great expense, for himself and the betterment of mankind, including the stockholders who had been defrauded in the past. Evidently, what Mr. Knutson had in mind and the substance of his testimony was to the effect that plaintiff had invested heavily in various stock exchange stocks in the year 1929-1930; that he had been defrauded and cheated and, therefore, decided to devote several years of his time in the writing of these books and to expend a very large sum of money for the purpose of preventing a recurrence of the debacle of 1931 et seq.

As shown by the Harris Case, fols. 3105-7, plaintiff took the stand in rebuttal and testified that the books were regarded by bankers as being more favorable to rich men than any other book covering the subject of economics which had ever been published.

Inasmuch as these books have already been testified to and are already in evidence in this case and both sides have copies thereof, it would greatly simplify the issues and would save this Court a great deal of labor if peti-

tioner were to leave a copy of each of these books with the Clerk of this Court for examination by the members of the Court in case they should care to make such examination. Certainly, the respondents are not in a position to object thereto and it seems to us that this is a matter entirely within the discretion of this Court.
state in the appendix a list of 6 of the outstanding head-

Therefore, we are asking permission of the Court to state in the appendix a list of 6 of the outstanding headlines of the book "Abolition of Poverty" and also where reference is made at a certain page of the book "Abolition of Poverty".

As shown by the cover of the book "Riches for All", a large number of copies of the book "Abolition of Poverty" were furnished at the time of its publication, to all the leading newspapers of the nation, also to prominent men of the day including the candidates for President, outstanding members of the United States Senate and House of Representatives, Economists, also judges of our Courts. And also as shown by the blurbs on the cover of the book "Riches for All" the book "Abolition of Poverty" received a vast amount of publicity by the newspapers throughout the nation. The candidate for the Democratic Party seemed to appreciate at once the political value of the issues raised by the book "Abolition of Poverty" and he had the intelligence, the intuition to note that these issues would be almost unbeatable in a national election. As the members of this Court probably recall, President Hoover took no notice of these ideas until a week or two before the election at which time he advocated a more equitable distribution of wealth; but it was too late. In order to show the impression made by this book upon Mr. Roosevelt and the Democratic Party, we quote from the Democratic National Platform of 1932 as follows:

> "Regulation to the full extent of Federal Power of (a) holding companies which sell securities in interstate commerce (b) rights of Utilities operating across state lines (c) Exchanges in securities and commodities."

On June 6, 1934 a Federal Statute created the Securities & Exchange Commission and inasmuch as this law was one providing for a reform, the law itself sets forth at great length the reasons why this Statute is Constitutional. The law itself referred to and related back not only to the reasons set forth in the Democratic Platform in the campaign of 1932 but also to the reasons and grounds set forth in the book "Abolition of Poverty" not, however, specifically mentioning the name of the Democratic Party or the book "Abolition of Poverty".

We respectfully submit that this Court will take judicial notice of everything contained in this Statute of June 6, 1934.

Stated differently, these three documents offer conclusive proof against the validity of proceedings in the New York State Courts and the transactions involved herein.

V

A constructive suggestion.

As already stated, no specific claim of any particular claimant is up for review in this proceeding except that of petitioner. Respondents assert that petitioner is the only Class A stockholder who rescinded the purchase of his Class A stock (R. Harris Case, fol. 3108) but we respectfully submit that the 50,000 potential claimants offer a very strong, really a conclusive argument why a writ herein should be granted as prayed for.

First, the claim of petitioner is based upon undisputed facts in the record, and the only issue to be determined so far as his claim is concerned is the matter of taxable costs and disbursements.

Second, the granting of the writ would serve notice that respondents must litigate all these claims either in the Court below or perhaps in a separate Federal suit.

Third, the defense of the present suit would collapse and it is quite probable that the entire controversy should be settled by stipulation.

Fourth, in lieu of such settlement, the parties could and probably would agree upon a statement of facts and might also agree to refer the controversy to a master or the Securities & Exchange Commission.

Fifth, we are much impressed with the conclusion that the so-called bloc of 50,000 claimants is entitled to a percentage, for example, of 30% of the fund to be distributed. (a) Probably not more than 1% of them are even aware that they possess a claim; (b) presumably, several thousand of them are at the present time engaged in the present war and they are not in a position to protect themselves; (c) it would entail great expense upon these claimants to even prepare a list of just who these claimants are. As shown by R. Harris Case, folio 1752, it is very uncertain where the books and records of the C. P. S. Corp. are located and it is plain that it would take a solid month to locate any particular record in the Baltimore Trust building and the larger part of these books and records are in Chicago, and some storage house is holding them and claiming a lien and even the C. P. S. Corp. may have no access to them. See folios 1766-1767. It is further obvious that if a certain percentage of the fund were awarded to this bloc of claimants, the respondents would no longer have any reason for withholding information. (d) This litigation being essentially nationwide in its scope, we respectfully submit that it would be especially appropriate if this Court were to bear in mind the peculiar exigencies of this case.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued as prayed for in his petition.

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